## FATIMAH BINTI MAT AKIR & ANOR. v. SHARIFAH BINTI HAJI AHMAD & ORS.

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) October 21, 1976]

[Alor Star — Federal Court Civil Appeal No. 55 of 1975]

*Distribution — Administration of Estates — Small estate — Distribution by Settlement Officer — Application to High Court to set aside distribution order — No appeal — Whether High Court has power to make distribution order in respect of small estate — Jurisdiction of High Court — Small Estate (Distribution) Ordinance, 1955, ss. 4(1), 7(1) and 29.*

In this case one Akil bin Lebai Mat died owning a quarter share in a piece of land. After his death, the Settlement Officer made a distribution order under the Small Estates (Distribution) Ordinance 1955 for the distribution of the estate to the beneficiaries according to Muslim Law. According to the record all the beneficiaries present agreed. Subsequently it was alleged that the first widow Aishah was of unsound mind. Her daughters who were her committee applied to the High Court to set aside or vary the Settlement Officer's order and for a declaration that a half-share of the deceased's interest in the land be transferred to Aishah as sharikat property. The learned trial judge dismissed the application as he held he had no jurisdiction ([1976] 1 M.L.J. 30). The appellants appealed.

**Held,** dismissing the appeal; (1) under section 4(1) of the Small Estates (Distribution) Ordinance it is not the High Court but the Collector who exclusively has original jurisdiction in the distribution of small estates;

(2) the proper course for the appellants was to have appealed against the Settlement Officer's Order, which they did not do, and therefore the application was rightly dismissed.

FEDERAL COURT.

The following authorities were cited in argument: *Tractors Malaysia Bhd.* v. *Tio Chee Hing* [1975] 2 M.L.J. 1, P.C.; *Au Yuan Chee* v. *Lim Leong Thiam & Ors.* (1956) 2 M.C. 260 and *In re Pratt* (1884) L.R. 12 Q.B.D. 334.

*A. Jayadeva* (*Oo Gin Sin* with him) for the appellants.

*R.C. Murugeson* for the respondents.

**Suffian L.P.:** Akil bin Lebai Mat died on October 20, 1956, leaving two widows and several children by each widow. Aishah binti Man the first widow is not of sound mind, and her two daughters (the two plaintiffs) are her committee. Sharifah binti Haji Ahmad the first defendant is the second widow.

Akil died owning ¼ share in a piece of land.

After Akil's death an application was made to the Settlement Officer, Pendang, Kedah, for distribution of Akil's estate to his beneficiaries according to Muslim law. The application was made under the Small Estates (Distribution) Ordinance No. 34 of 1955. According to the Settlement Officer's record, all present agreed to the estate being distributed according to Muslim law and accordingly on June 15, 1966, the Settlement Officer made an order under the Ordinance by which he awarded 128/2048 share in the land to Aishah the first widow as her share.

The plaintiffs have brought this suit against the first defendant and eight other relatives, seeking to set aside the Settlement Officer's order. They allege that before the date of the order Aishah had been of unsound mind for 30 years; that at the time of the order she was of unsound mind; that her consent to the distribution order was not valid; that she should have been awarded half her husband's interest in the land as sharikat property (acquired by the joint efforts of herself and her late husband); that on November 10, 1966, a few months after the order she was admitted to the General Hospital, Penang, where she was declared to suffer from pre-senile dementia very likely due to cerebral arteriocleris and that she was incapable of managing her own affairs; wherefore the plaintiffs pray for an order that the Settlement Officer's order be set aside or varied or rectified and for a declaration that half Akil's interest in the land be transferred to Aishah as sharikat property.

On February 18, 1975, when the case came up for hearing, Mr. R.C. Murugesan for the 1st, 4th, 5th, 6th and 7th defendants raised a preliminary objection. He argued that —

(1) the High Court had no jurisdiction to entertain the plaintiffs' claim to set aside the distribution order and

(2) the statement of claim disclosed no cause of action.

The learned judge held that he had jurisdiction, particularly if the plaintiffs' claim was based on fraud. But he decided to dismiss the plaintiffs' claim without hearing the evidence, holding that from the record of the proceedings before the Settlement Officer not only was Aishah present, her daughters (the two plaintiffs) were also present; that if Aishah had been of unsound mind for thirty years previously (as alleged in the pleadings), then surely her daughters must have known about it and yet none of them informed the Settlement Officer, and in view of this it cannot be said that there had been fraud and therefore there was no cause of action.

The plaintiffs have appealed to us.

Mr. Jayadeva argued on their behalf that the High Court has jurisdiction, as the learned judge has held, and that having so held the learned judge should have heard the evidence and counsel's submissions on the law, and that only then should the learned judge have dismissed the plaintiffs' claim if he saw fit, and that in the circumstances of this case the Federal Court should allow the appeal and order the lower court to hear the evidence and consider submissions, and then, and only then decide on the case.

Mr. Murugesan repeats before us his contention that the High Court has no jurisdiction to entertain this suit.

The issue in this case is whether or not the High Court has jurisdiction to entertain this suit.

With all due respect to Mr. Jayadeva, I do not agree that the High Court has jurisdiction to entertain this suit.

The suit is an attempt to get an order whereby an interest in Akil's estate should devolve on or vest in his beneficiaries. Normally the High Court would have jurisdiction to entertain it. But this suit relates to a small estate and the legislature has expressly provided bv section 4(1) of the Small Estates (Distribution) Ordinance that it is not the High Court, but the Collector, who *exclusively* has original jurisdiction. That section provides:—

"Save as in this Ordinance otherwise provided no interest in any small estate shall devolve on or vest in any person by virtue of any instrument other than an order or grant made under the provisions of this Ordinance [by the Collector, etc.]."

Further, section 7(1) expressly provides that:—

"If the Registrar [of the High Court] is satisfied that any intestate estate in respect of which a petition for letters of administration has been filed in the High Court is a small estate he shall transfer such petition to the Collector...."

It is plain that the scheme of the Ordinance is that in matters relating to the administration of a small estate the small man should be spared the trouble of going to the High Court with its technicalities and expense and that instead his problems should be dealt with expeditiously and informally by the Collector who has special experience with and knowledge of the peasantry.

In view of this I am of the opinion that the learned judge was right in dismissing this action, though not for the reason given by him.

The proper course for the appellants was to have appealed against the Settlement Officer's order, which they did not do, for though the High Court has no original, it has however appellate jurisdiction over the administration of small estates.

I would therefore dismiss this appeal with costs. The appellants' deposit should be paid to the respondents against their taxed costs.

Appellants' deposit to respondents against their taxed costs.

**Ali F.J.:** Akil bin Lebai Mat alias Mohd. Akil bin Ahmad (hereinafter referred to as the deceased) died intestate leaving an undivided share in a piece of land in Kedah. He also left two widows, namely (1) Aishah binti Man; and (2) Sharifah binti Haji Ahmad and several other beneficiaries.

On the petition of one of the beneficiaries, Khosim bin Md. Akil, respondent No. 3, the estate was distributed as a small estate by the Settlement Officer, Pendang, Kedah. In terms of section 4(2) of the Small Estates (Distribution) Act No. 98 of 1955 (hereinafter referred to as the Act) the officer has exclusive jurisdiction to deal with the distribution and administration of a small estate which is defined in section 3 of the Act to mean an estate the total value of which does not exceed $25,000.

Sometime in 1968 Aishah, one of the widows, was found to be of unsound mind and two of the beneficiaries, Fatimah binti Mat Akir and Tam alias Itam binti Mohamed Akib, the appellants, were appointed Committee by the High Court to manage her affairs.

On March 23, 1969 the appellants brought an action in the High Court at Alor Star, Kedah, in which the following reliefs were asked:

"(1) An order that the Order made by the Settlement Officer, Pendang on June 15, 1966 in Distribution Suit No. 107 of 1966 in the estate of Akil bin Lebai Mat alias Md Akil bin Ahmad deceased ordering that the land comprised in Surat Putus No. 52210 in the Mukim of Bukit Raya, Kota Star, Kedah in area 32 relong Oll jemba more or less (to the extent of 10/40th undivided share) be transferred and distributed to the lawful beneficiaries of the said deceased according to the Muslim Law of Distribution may be set aside or varied or rectified and all transactions may be expunged from the record in the title deed in the Land Office, Pendang.

(2) For a declaration that the said land comprised in Surat Putus No. 52210 in the Mukim of Bukit Raya, Kota Star, Kedah in area 32 relong 011 jemba more or less (to the extent of 10/40th undivided share) be transferred to Aishah binti Man to the extent of one half share thereof being sharikat property acquired by the joint earnings of Aishah binti Man and Akil bin Lebai Mat alias Md. Akil bin Ahmad deceased.

(3) That the one half share of the estate of the said Akil bin Lebai Mat alias Md. Akil bin Ahmad deceased be distributed among the lawful beneficiaries of the estate of the said deceased according to the Muslim Law of Distribution."

The beneficiaries who were made defendants in the action had raised, *inter alia*, the question of jurisdiction which was dealt with as a preliminary objection. The learned judge, Syed Agil Barakbah J., after hearing arguments on the question dismissed the action. The appellants have now appealed to this court.

I have referred to the 3 reliefs in full as in my view they are relevant to the question of jurisdiction.

Relief No. (1) which seeks to set aside the distribution order raises the question whether it could be set aside other than by way of appeal under section 29 of the Act. In this case the appellants have not appealed against the order for the reason, as stated by counsel, that when Aishah was found to be of unsound mind it was too late to appeal. I do not think that is a good reason for not appealing as leave to appeal out of time could have been applied for. It was not applied for probably because the appellants were advised that they could circumvent the Act by bringing the action in the present proceedings.

The High Court's jurisdiction to set aside a distribution order as stated is clearly provided by section 29 of the Act. The jurisdiction is appellate and not original. Counsel for the appellants had submitted in the court below that the court in the exercise of its original jurisdiction under section 23 of the Courts of Judicature Act 1964 can set aside the order. With respect the jurisdiction under the section is to try civil proceedings and not to set aside an order of another tribunal.

It was also submitted that a consent order obtained by fraud can be set aside by the High Court. Authorities were cited in support of this view. Here again I respectfully disagree. The power to set aside such an order is given by the Rules of the Supreme Court and the court is given power because the order was made by the court itself. The distribution order here was not made by the court but by the Collector or Settlement Officer under the Act.

The learned judge seemed to have agreed with this second submission but held that he had no jurisdiction because fraud was not pleaded by the appellants.

Quite clearly I think the only way to have the order set aside was to appeal under section 29 of the Act. If the appellants had appealed, the question would arise whether the fact that Aishah was of unsound mind at the time of the distribution proceedings, as apparently alleged in paragraph 13 of the statement of claim, could be a good ground for setting aside the order.

I do not think so for the reason that Aishah would have got her beneficial share of the estate as a widow in any case. In terms of section 10(1) of the Act her state of mind would not have made any difference to the validity of the distribution proceedings.

Thus stated it would seem clear to me that the main purpose of the action by the appellants was to get from the court a new distribution order as in relief No. (3) based on the declaration asked for in relief No. (2).

To achieve this purpose it was necessary to have the distribution order made by the Collector to be set aside. Viewed in this context I cannot help saying that the appellants were seeking to circumvent the Act, the clear object of which is to facilitate the distribution and administration of small estates and reduce costs normally involved in court proceedings. The objection on jurisdiction as was taken by the respondents should be upheld.

As to the jurisdiction of the court to make a distribution order in respect of small estates such as in this case it is to be observed that section 4(2) of the Act expressly states that the Collector shall have exclusive jurisdiction to deal with the distribution and administration of small estates. I think the word "exclusive" must mean that only the Collector shall have jurisdiction and no others. If that is correct I cannot see how relief No. (3) could be granted by the court. Before the Act the High Court in Kedah had jurisdiction to deal with estates exceeding $5,000/- in value by virtue of section 20 of the Kedah Administration of Estates Enactment No. 1. But the section had been repealed by section 32 of the Act making it abundantly clear that the intention of the Act was to take away the jurisdiction of the court in respect of small estates. I must point out, however, that this is true only of estates of persons who die intestate because section 5 of the Act expressly states that the jurisdiction of the High Court to grant probate shall not be affected.

Taking the view as I do of the provisions of the Act I am compelled to the conclusion that the appeal must fail. Accordingly the appeal is dismissed with costs, the appellants' deposit to go to the respondents against their taxed costs.

**Wan Suleiman F.J.** concurred.

*Appeal dismissed.*

Solicitors: *Oo Gin Sun, Bakar & Co.; R.C. Murugeson.*

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## GENERAL TRADING CORPORATION (M) SDN. BHD. v. OVERSEAS LUMBER BHD.

**[F.C. (Gill Ag. L.P., Ali Ag. C.J. (Malaya) and Ong Hock Sim F.J.) October 29, 1976]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 68 of 1976]**

*Practice and Procedure — Application to sign summary judgment — Claim on contract — Defence of alleged rescission, modification or variation of contract and want of consideration — Triable issues — R.S.C. 1957, O.14.*

The appellants had applied for summary judgment against the respondents on a claim for breach of contract to supply timber. The respondents denied that they were in breach of contract and alleged rescission, modification or variation of the contract and also contended that the contracts were void for want of consideration. The Deputy Registrar dismissed the application holding that the respondents have a *bona fide* defence. An appeal to the High Court was dismissed and the appellants appealed to the Federal Court.

**Held,** dismissing the appeal: (1) the purpose of Order 14 is to enable a plaintiff to obtain summary judgment if he can prove his claim clearly;

(2) in this case in view of the defence allegations of rescission, modification and variation it could not be said that liability for breach of contract had been clearly established.

FEDERAL COURT.

*Wong Chong Wah* for the appellants.

*S.Y. Woo* for the respondents.

**Ali Ag. C.J. (Malaya):** This is an appeal from an order giving the respondents, Overseas Lumber Berhad, unconditional leave to defend the action in an application by the appellants, General Trading Corporation (M) Sdn. Bhd., for summary judgment under Order 14. The application was dismissed by the Deputy Registrar holding that the respondents have a *bona fide* defence. On appeal to the judge, Abdul Hamid J. dismissed the appeal saying that he agreed with the Deputy Registrar and that so far as it was a discretionary matter the Deputy Registrar had correctly exercised his discretion.

The claim by the appellants was for breach of contracts to supply timber. There were 14 contracts in all, each dated February 20, 1975. Under each of these contracts the respondents agreed to supply timber during certain specified period or periods. In some of the contracts the latest date on which delivery was to be made was the month of May. On the pleadings the appellants said that part of the timber under certain contracts were supplied but the balance was not. On August 21, they wrote to the respondents demanding the supply of the balance. On the respondents' failure to supply they issued a specially indorsed writ claiming $257,580 as loss and damages for breach of the contracts.

The respondents filed a defence in which they alleged rescission, modification or variation of the contracts by mutual consent or by fresh contracts. They also contended that the contracts were void for want of consideration. In any event, they denied that they were in breach of the contracts. On the ground that the appellants' pleadings did not disclose any cause of action they prayed for its dismissal.

The appellants in their affidavit verifying the cause of action stated the belief that there was no good